

No. 17,432

IN THE

United States Court of Appeals
For the Ninth Circuit

OLSON TOWBOAT COMPANY, OLSON STEAM-
SHIP Co., the Tug "JEAN NELSON",
the Barge "FLORENCE",
Appellants,

vs.

JOAO DUTRA,

Appellee.

REPLY BRIEF OF APPELLANTS

JOHN H. BLACK,

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San Francisco 4, California,

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Proctors for Appellant.

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REPLY BRIEF OF APPELLANTS

Counsel for appellee cites some of the testimony from the transcript of the record at pages 38 and 39, and then cites cases which he claims support his contention that liability exists for negligence and/or unseaworthiness.

The first case cited by counsel for appellee is
Cowgill v. Boock, 218 P. 2d 445.

This case involves a death of a passenger as a result of an automobile accident. In this case the evidence of skid marks, position of the bodies, etc., gave rise to facts and circumstances from which an inference of negligence could be inferred.

However, in the instant case, no such circumstantial evidence exists. There are just no facts or circumstances from which an inference can be drawn.

Counsel for appellee cites the case of

Petterson v. Alaska Steamship Co., Inc., 205
Fed. 2d 478.

In this case the court stated that the vessel incorporated the block brought aboard by the stevedores and it became a part of the ship's equipment, and the court stated that if the block broke, and if it was a faulty block, it became a part of the vessel's equipment, and that the stevedore could recover from the vessel on the grounds of unseaworthiness of the vessel.

In the instant case, there is no unseaworthy condition as there was in the *Petterson* case.

In the *Petterson* case, the court states, at page 479:

“It is only necessary to show that the condition upon which absolute liability is determined—unseaworthiness—exists. *Mahnich v. Southern Steamship Co.*, 321 U.S. 96. That has been shown here.”

That has not been shown in the instant case. That is the fundamental difference.

The other case cited by appellee is

Litwinowicz v. Weyerhaeuser Steamship Co.,
179 Fed. Supp. 812.

In this case, improper devices were furnished by the stevedore, to wit: Baltimore dogs. These improper devices made the vessel unseaworthy. The “Baltimore dog” was not being used for the purpose intended. The appellant has no quarrel with the proposition, but it is not applicable to the instant case.

CONCLUSION

It is respectfully submitted that in the brief of appellee, said appellee constantly refers to statements as follows:

“There can be no conclusion except that there was a defect in the wire loop which cut appellee’s finger.”

He further goes on and states:

“If there was no defect there would be no cut.”

He further states at page 5 of his brief:

“Common knowledge and experience creates a clear inference that the accident would not have happened if there was not some defect in the mooring line and obviously appellee’s injury resulted from his handling of said mooring line.”

Appellee then makes an isolated statement that all of the elements of *res ipsa loquitur* are present, without producing any cases which show that this case would fall within the doctrine of *res ipsa loquitur*.

For the reasons set forth in the opening brief of appellant and those matters set forth and discussed in appellee’s brief, it is submitted that the findings of fact and conclusions of law are not justified by the evidence, and that this Court should reverse the decision of the District Court.

Dated, San Francisco, California,
February 2, 1962.

JOHN H. BLACK,
HENRY SCHALDACH,
Proctors for Appellant.

